89-223

Supreme Court, U.S.
FILED
JUL 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MARTIN A. SCHOTTENFELD,
- PETITIONER -

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

and

THOMAS J. GALVIN,
- RESPONDENTS -

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

submitted by :
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petitioner-pro se
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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER A PROMISE CONTAINED IN A PENSION PLAN, IN EFFECT DURING THE TIME OF EMPLOYMENT OF AN EMPLOYEE WHO IS A PARTICIPANT OF THIS PENSION PLAN, IS BINDING AND ENFORCEABLE, REGARDLESS OF THE SUBSEQUENT AMENDMENTS MADE BY THE EMPLOYER TO THIS PENSION PLAN, REDUCING OR ELIMINATING THE INITIAL PROMISE.

B. WHETHER THE COURT BELOW HAS DECIDED PROPERLY OR IMPROPERLY IN THE PRESENT CASE, WHEN CONNECTING THE INITIAL PENSION PLAN WITH THE SUBSEQUENT AMENDMENTS MADE BY THE RESPONDENTS, REDUCING THE BENETIFS, THEN APPLYING THOSE AMENDMENTS TO THE PETITIONER, WHO IS A PARTICIPANT OF THE ORIGINAL PENSION PLAN.

C. WHETHER THE COURT BELOW HAS RESOLVED PROPERLY OR IMPROPERLY THE PRESENT CASE, WHEN TOTALLY IGNORING AND NOT DECIDING UPON ANY OF THE LEGAL PROCEDURAL MATTERS BROUGHT UP BY THE PETITIONER.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Martin A. Schottenfeld, respectfully prays that a writ of certiorari be issued to review the order and decision of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 3, 1989.

I.

OPINION BELOW

The order and decision of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the reasons set forth in the Memorandum Opinion of the District Court, is attached as Exhibit No. 2 (pages P3-P6). No separate opinion was issued by the Court of Appeals for the Second Circuit. The Memorandum Opinion of the District Court for the Southern District of New York is attached as Exhibit No. 3 (pages P7-P18).

II.

JURISDICTION

The order and decision of the Court of Appeals for the Second Circuit was filed on March 3, 1989. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C., Section 1254(1)

III.

STATEMENT OF THE CASE

Petitioner has brought the lawsuit at the District Court for the Southern District of New York, pursuant to Section 1132 (a) (1) (B) of E.R.I.S.A. of 1974 with subsequent modifications,. U.S.C. 29.

Petitioner has worked with the respondent CON EDISON as a permanent employee from June 1969 until July 1, 1986, when petitioner retired at the age

of 67 (P64, No. 2). The second respondent, Thomas J. Galvin, is the Plan Administrator of Con Edison's pension plans (P64, No. 4).

The 1975 Con Edison pension and Benefits plan, of which the petitioner is a participant (P64, No. 3) provides a clear definition of the accredited service for the computation of a retirement pension, promising that:

- "Accredited service for the computation of a pension will be the total of the months and years of service the employee was continuously in the employ of the Company in other than a temporary status" (P43, (B) (1)).

The definition of the Accredited service, provided clearly in the 1975 Con Edison

pension and Benefits plan, does not mention any restriction or limitation by age.

Subsequent to 1975, the respondent Con Edison made amendments to the 1975 pension and Benefits plan, limiting the accredited service for the computation of a pension to age 65. But in the new 1983 Con Edison Retirement Plan for Management Employees, effective 1/1/1983, containing those amendments, is also included a special provision of "Benefits for participants of the prior plan" (P41), which exempts the participants of the prior 1975 pension plan from being sujected to the amendments limiting the accredited service to age 65 and provides the continuation of the old 1975 formula of computation of a pension based on the

"Total Salary prior to Retirement," for participants of the prior 1975 pension plan.

The respondents have refused to comply with the special provision in the 1983 Retirement plan for Management Employees (P41) and have limited the computation of the accredited service for petitioner's pension to age 65, based on the amendments to the pension plan (P61).

The correct Revised computation of petitioner's pension, made by petitioner, is based on the Definition of the Accredited service, provided in the 1975 Con Edison pension and Benefits plan and on the formula reproduced in the 1983 Con Edison Retirement Plan for Management Employees, booklet of 40 pages, page No. 5, the petitioner being a participant of

the prior 1975 Pension and Benefits Plan (P58; P43 (B) (1); P41 "Benefits for the participants of the prior plan"; P64, No. 3).

On 12-22-1987 the petitioner has moved for partial Summary Judgment (P25).

On 2-17-1988 the respondents have filed a Cross-Motion for Summary Judgment. The Memorandum Opinion and Judgment of the District Court were entered on 8-26-1988, denying petitioner's Motion for partial Summary Judgment and granting respondents' Cross-Motion for Summary Judgment (P7-P18;P21).

On 9-23-1988 the petitioner has filed a Notice of Appeal from the Opinion and Order and from the Judgment of the District Court (P23).

On 3-03-1989 the Court of Appeals for the

Second Circuit has affirmed the Judgment of the District Court, relying substantially on the Opinion of the District Court (P3-P6).

IV.

REASONS FOR GRANTING THE WRIT

A. ERROR OF LAW

The definition of the "Accredited service for computation of a pension," contained in the 1975 Con Edison Pension and Benefits plan, is clear and complete (P43, (B) (1)). With this clear definition, the respondents have promised that "the total of the months and years of service... in other than a temporary status" will be accredited for the computation of a pension. There is no one word mentioned in the above definition about the retirement age or about any limitation by age.

The District Court has altered the above clear and complete definition of

the "Accredited service for computation of a pension," by adding the retirement age of 65 and by limiting the Accredited service to age 65 (P9, footnote (1)).

The respondents have amended the 1975 pension plan, effective September 1980, modifying the definition of the "Total Salary" in terms of years of "accredited service" to be limited to "prior to Normal Retirement Date," that means prior to age 65 (P10, 1st paragraph). It appears clear, that the definition of "Accredited service for computation of a pension," contained in the 1975 pension and Benefits Plan" did not make any limitation by age and that the respondents have introduced the limitation to age 65 in the 1980 Amendment to the pension plan.

The Opinion of the District Court that the 1980 Amendment made by the respondents to the pension plan, would be applicable to the petitioner, who is a participant of the 1975 Con Edison pension and Benefits Plan is legally erroneous (P11-P12, 1st paragraph).

The promise contained in the 1975 Con Edison pension and Benefits Plan, that all the months and years of service...in other than a temporary status" will be accredited for the computation of a pension, is clear, binding and legally enforceable and should not be altered (Section 1132, (a) (1) (B) of E.R.I.S.A., U.S.C. 29).

B. THIS CASE PROVIDES THE SUPREME COURT OF THE UNITED STATES WITH THE OPPORTUNITY TO RESOLVE CONFLICTING DECISIONS BY HIGHER FEDERAL COURTS IN SIMILAR CASES.

In the 1983 Con Edison Retirement Plan for Management Employees - booklet of 40 pages, page No. 5 - was included a special provision entitled "Benefits for participants of the prior plan" (P41). In this special provision was reproduced the old formula for computation of a retirement pension, based on the "Total Salary prior to retirement," applicable to participants of the prior 1975 Con Edison Pension and Benefits Plan. This special provision had the scope to exempt the participants of the prior 1975 pension plan from being subjected to the

amendments to the 1975 pension plan, made by the respondents and contained in the 1983 Retirement Plan for Management Employees. The amendments contained in the 1983 Retirement Plan for Management Employees have limited the accredited service for computation of a pension to age 65.

In the Opinion of the District Court was made a nexus between the special provision of "Benefits for participants of the Prior Plan," contained in the 1983 pension plan - booklet of 40 pages, page No. 5 - and the amendments to the 1975 pension plan, contained in the 1983 pension plan (P41; P11, P12, 1st paragraph; P13-P16).

The nexus created by the District Court between the special provision of

"Benefits for Participants of the Prior Plan" (P41) and the amendments made by the respondents to the 1975 pension plan, which amendments are contained in the 1983 pension plan, limiting the accredited service to age 65, has annihilated the meaning and the scope of the special provision of "Benefits for participants of the prior plan," contained in the 1983 pension plan (P41; P124, No. 8; P125-P128).

In the case Mahoney et al. v. Atlas Tack Corporation (581 F.2-d 1), the U.S. Court of Appeals for the First Circuit has decided that promises made in a pension plan are and remain binding and enforceable, even if the pension plan is subsequently modified or terminated. This decision was upheld by the Supreme

Court of the United States. Petition for writ of certiorari was denied, with the Order No. 78-936.

The Decision of the Court of Appeals for the Second Circuit in this case, dated March 3, 1989 (P3), is conflicting with the Decision of the Court of Appeals for the First Circuit in the case Mahoney et al. v. Atlas Tack Corporation, 581 F.2-d 1, which was upheld by the Supreme Court of the United States, with the Order No. 78-936.

The Supreme Court of the United States has now the opportunity to review the decision of the Court of Appeals for the Second Circuit in the present case and to resolve the conflicting decisions in similar cases.

C. OMISSION BY THE DISTRICT COURT AND BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT TO CONSIDER AND TO DECIDE UPON ANY OF THE LEGAL PROCEDURAL MATTERS BROUGHT UP BY THE PETITIONER.

The petitioner has brought up before the District Court, as well as before the Court of Appeals for the Second Circuit, numerous procedural matters based on the Federal Rules of Civil Procedure (P68 to P80; P107 to P113, First paragraph).

Both Courts Below have not considered and not decided upon any of the legal procedural matters brought up by the petitioner. Particularly it is to be noted that both Courts Below have not considered at all and have not decided upon petitioner's objections to respondents' Cross-Motion for Summary

Judgment under the Rule 56 of the Federal Rules for Civil Procedure (P73; P108).

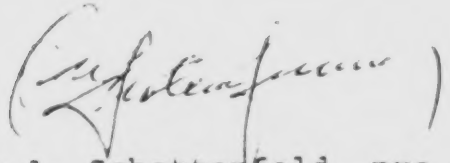
V.

CONCLUSION

In light of the foregoing, it appears clear that the petition for writ of certiorari is well reasoned and fully justified.

This Court has an important opportunity to decide about the enforceability of promises made in a pension plan during the employment and to resolve conflicting decisions of higher Federal Courts on this matter, especially the conflicting decision of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,



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Dated: June 28, 1989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARTIN A. SCHOTTENFELD,

- PETITIONER -

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

and

THOMAS J. GALVIN,

- RESPONDENTS -

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

---

submitted by :
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Exhibit No.	Docket No. at the D.C.	Description and page(s)
1	-	Order No. A-929, signed by the Honorable Justice MARSHALL, granting an extension of time for filing a petition for writ of certiorari. P1-P2
2	25	Order of the U.S. Court of Appeals for the Second Circuit, dated March 3, 1989, affirming the Judgment of the District Court. P3-P6
3	20	Opinion and Order # 63038 of the District Court, entered on 8-26-89. P7-P18

Exhibit No.	Docket No. at the D.C.	Description and page(s)
4	14	Order of the District Court entered on 1-26-88. P19-P20
5	21	Judgment of the District Court, entered on 8-26-88. P21-P22
6	22	Notice of Appeal, filed on 9-23-88, at the District Court for the Southern District of New York. P23-P24
7	12	Notice of Motion for partial summary judgment, filed by petitioner (plaintiff) on 12-22-87. P25-P27

Exhibit No.	Docket No. at the D.C.	Description and page(s)
8	12	Affirmation in support of the Motion, filed by petitioner (plaintiff) on 12-22-87. P28-P33
9	12	Statement of the material facts, under Local Rule 3 (g), filed by petitioner (plaintiff) with the Motion on 12-22-87. P34-P36
10	12	page No. 5 of the Con Edison Retirement Plan for Management Employees- booklet of 40 pages- effective January 1, 1983. P37-P42

Exhibit No.	Docket No. at the D.C.	Description and page(s)
11	12	pages No. 14, 15 and 16 of the Con Edison pension and Benefits plan, effective 8-1-1975. P43-P48
12	12	pages No. 2, 5 and 6 of Con Edison's Answers to petitioner's (plaintiff's) First set of Interrogatories P49-P53
13	13	petitioner's (plaintiff's) Memorandum filed on 1-4-1988. P54-P57

Exhibit No.	Docket No. at the D.C.	Description and page(s)
14	13	Revised computation of petitioner's Retirement pension, filed by petitioner (plaintiff) with the Memorandum on 1-4-1988. P58-P60
15	12	Computation of petitioner's actual retirement pension, made by the respondents (defendants). P61-P62
16	15	Statement under Local Rule 3 (g) filed by the respondents (defendants), attached to the Cross-Motion for Summary Judgment, on 2-17-88. P63-P67

Exhibit No.	Docket No. at the D.C.	Description and page(s)
17	18	Memorandum of Law in opposition to defendants' Cross-Motion for Summary Judgment, in response to defendants' opposition to plaintiff's Motion for partial Summary Judgment and in support of plaintiff's Motion for partial Summary Judgment, filed by petitioner on 3-11-1988. P68-P87
18	19	Affidavit of Martin A. Schottenfeld. P88-P89

Exhibit No.	Docket No. at the D.C.	Description and page(s)
19	17	Con Edison Memorandum dated January 1984, presented to and signed by petitioner with clear disagreement on 4-24-84. P90-P92
20	-	Appellant's Brief to the U.S. Court of Appeals for the Second Circuit, filed by petitioner on 12-15-1988. P93-P130
21	7	Amended complaint filed by petitioner (plaintiff) on 10-15-1987. P131-P138

Exhibit No.	Docket No. at the D.C.	Description and page(s)
22	-	Docket Entries at the District Court for the Southern District of New York. P139-P145

SUPREME COURT OF THE UNITED STATES

No. A-929

Martin A. Schottenfeld,

Petitioner

v.

Consolidated Edison Company of New York, Inc. and Thomas J. Galvin

---

O R D E R

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

July 1, 1989.

/s/ Thurgood Marshall

Associate Justice of the Supreme

Court of the United States

Dated this 25th

day of May, 1989.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of March, one thousand nine hundred and eighty-nine.

SDNY

87 civ-2650

Sprizzo

PRESENT:

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS

HONORABLE FRANK X. ALTIMARI

Circuit Judges.

----------X

MARTIN A. SCHOTTENFELD

Plaintiff-Appellant,

- against - 88-7827

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THOMAS J. GALVIN,

Defendants-Appellees.

----------X

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court is AFFIRMED substantially for the reasons

set forth in the opinion of Judge Sprizzo, dated August 19, 1988.

Schottenfeld v. Consolidated Edison Co. of New York, Inc.

88-7827

/s/WILFRED FEINBERG

/s/WILLIAM H. TIMBERS

/s/FRANK X. ALTIMARI

Circuit Judges

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise

relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

MARTIN A. SCHOTTENFELD,

Plaintiff Pro Se,

-against- 87 Civ. 2650 (JES)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and THOMAS J. GALVIN, MEMORANDUM OPINION AND ORDER

Defendants.

----------X

SPRIZZO, D.J.

Plaintiff pro se Martin Schottenfeld brings this action pursuant to section 502(a) (1) (B) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (a) (1) (B) (1982). Named as defendants are the Consolidated Edison Company of New York, Inc. ("Con Ed"), plaintiff's former employer, and Thomas

J. Galvin, Plan Administrator for the Retirement Plan for Management Employees. Plaintiff alleges that defendants improperly calculated his pension benefits by failing to credit plaintiff for the 23 months of service between his 65th birthday and the date he retired. The parties have filed cross-motions for summary judgment.

The material facts are not in dispute. Plaintiff was continuously employed by Con Ed from June 30, 1969 until he retired on July 1, 1986, just prior to his 67th birthday. See Amended Complaint at 1; Plaintiff's Statement of the Material Facts at ¶ 1; Defendants' Rule 3(g) Statement at ¶¶ 1-2. Plaintiff contends that the governing pension plan requires that all years of continuous service be credited for computation of

pension benefits. Examination of the undisputed evidence, however, reveals that plaintiff has misread the terms of the plan.

Prior to 1978, Con Ed's pension plan provided pension benefits based upon an employee's age at retirement, years of service, and earnings. See Affidavit of Sheldon E. Reichard ("Reichard Aff.") at ¶¶ 3-4. The plan also provided for a mandatory retirement age of 65. Id.; Defendants' ("Def.") Ex. A at 5. Thus, only service prior to age 65 could be credited in calculating pension benefits.[1]

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1. Plaintiff apparently bases his argument that all years of continuous service are to be credited for pension purposes on the plan in effect in 1975,

Pursuant to a 1978 amendment to the Age Discrimination in Employment Act ("ADEA") prohibiting mandatory employment prior to age 70, the pension plan was amended effective September 1980 to change the mandatory retirement age to age 70. See Def. Ex. C at 9. The plan was also amended to define the "Total Salary" to be used in calculating pension benefits in terms of years of accredited

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which defined "accredited service" as "the total of the months and years of service the employee was continuously in the employ of the Company in other than a temporary status." See Plaintiff's Ex. P-2 at 14. However, as noted above, that version of the plan also provided for mandatory retirement age of 65. See Def. Ex. A at 5.

service "prior to Normal Retirement Date." Id. at 3. "Normal Retirement Date" was defined as "the first day of the month following the participant's attainment of age 65." Id. at 8. To make it clear that years of service after age 65 would not be credited for pension purposes, the definition of "Accredited Service" was also amended to limit that term to service "prior to Normal Retirement Date [Age 65]." Reichard Aff. at ¶ 5; Def. Ex. C at 4. These provisions remained in the pension plan during the remaining years of plaintiff's employment. Reichard Aff. at ¶ 5; see also id. ¶ 6; Def. Ex. D at 4-5, 9; Def. Ex. F at 3-4, 7, 12.

Thus, it is clear from a review of the documents discussed above that at no time during plaintiff's employment did

the plan provide that months or years worked after attaining age 65 would be credited for pension calculation purposes. It follows that defendants' calculation of plaintiff's pension benefits must be upheld. See, e.g., Schwartz v. Newsweek, Inc., 827 F.2d 879, 881 (2d Cir. 1987); Miles v. New York State Teamsters Conference, 698 F.2d 593, 599 (2d Cir.), cert. denied, 464 U.S. 829 (1983).

Although plaintiff disputes defendants' contention that he was notified "[o]n a number of occasions" of the changes in the pension plan, see Plaintiff's [Reply] Memorandum of Law ("Pl. Reply") at 3-4; Reichard Aff. at ¶ 12, plaintiff does not dispute that in 1984, three months before his 65th birthday, he attended a pre-retirement interview and was informed that his pension would

remain unchanged should he continue to work beyond age 65. See Reichard Aff. at ¶ 7. Moreover, plaintiff signed a memorandum memorializing that interview. Id.; Pl. Reply at 3. The memorandum clearly provides that "[a]s permitted by the law, [plaintiff] will not accrue pension credit after [his] normal retirement date, which at Con Edison is the first day of the month following . . . attainment of age 65." Def. Ex. E. Above his signature on the memorandum, plaintiff wrote "I disagree." Id.

Plaintiff's signature and statement on the memorandum make it unquestionably clear that plaintiff was aware of the amendments to the pension plan prior to his retirement and of defendants' view that those amendments did not entitle him to accrue pension credit based on service

after his 65th birthday. The fact that plaintiff disagreed with that interpretation, as indeed this litigation demonstrates, in no way detracts from the fact that plaintiff had notice of defendants' interpretation of the plan at the time he retired and was in no way prejudiced by the claimed lack of notice. Compare Govoni v. Bricklayers, Masons and Plasterers, 732 F.2d 250, 252-53 (1st Cir. 1984).[2]

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2. Plaintiff argues that the terms of a booklet which he received govern calculation of his benefits. Plaintiff cites to page 5 of the booklet, which provides that participants employed by Con Ed in 1982 "will be entitled to a minimum benefit equal to the pension [they] would have received under the prior plan," and

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that "Total Salary" as used to calculate benefits "represents . . . earnings for 14 years prior to retirement . . . ." Plaintiff's Ex. P-1 at 5; Def. Ex. I at 5. However, the booklet also states that "[i]f you choose to continue working for the Company past your normal retirement date [defined above as age 65], . . . your pension will be equal to the amount you would have received had you retired at normal retirement date." Def. Ex. I at 2. Therefore, the booklet also clearly put plaintiff on notice that service after his 65th birthday would not be credited in calculating his pension. Moreover, as noted above, no prior pension plan provided pension credit for service after age 65.

In addition, the booklet cautions that it

"describes only the highlights of the plan" and that in the event of a conflict, the official plan controls. See id. at 20-21. Thus, even if the booklet conflicted with the official plan text, which it does not, the official plan text would control. See Kolentus v. Avco Corp., 798 F.2d 949, 958 (7th Cir. 1986), cert. denied, 107 S.Ct. 878 (1987).

For the reasons set forth above, plaintiff's motion for partial summary judgment must be denied, and defendants' cross-motion for summary judgment must be granted. The Clerk of Court shall enter judgment accordingly and close the above-captioned action.

It is SO ORDERED.

Dated: New York, New York
August 19, 1988

/s/ John E. Sprizzo
United States District Judge

APPEARANCES

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Attorney for Defendants
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JONATHAN A. FIELDS, ESQ.
Of Counsel

Appellant's Exhibit No.

A-17

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

MARTIN A. SCHOTTENFELD,

-against- 87 Civ. 2650 (JES)

CONSOLIDATED EDISON COMPANY, ORDER

Defendant(s).

----------X

Plaintiff Pro Se and Counsel for defendant in the above-captioned action having appeared before this Court at Pre-Motion Conference on January 11, 1988, and the Court having considered all issues raised at the Pre-Motion Conference, it is

ORDERED that the defendant shall cross-move for summary judgment and respond to plaintiff's motion for summary

judgment on or before February 12, 1988; and it is further

ORDERED that plaintiff shall respond to defendant's motion on or before March 11, 1988; and it is further

ORDERED that defendant shall reply to plaintiff's response on or before April 8, 1988; and it is further

ORDERED that Oral Argument shall be held on June 10, 1988 at 10:30 AM.

Dated: New York, New York
January 13, 1988

/s/ John E. Sprizzo
United States District Judge

SOUTHERN DISTRICT OF NEW YORK Sprizzo, J.

----------X

MARTIN A. SCHOTTENFELD, DOC # 21

Plaintiff Pro Se,

against 87 Civil 2650 (JES)

CONSOLIDATED EDISON JUDGMENT

COMPANY OF NEW YORK INC.

and THOMAS J. GALVIN,

Defendants.

----------X

All parties having moved for summary judgment, and the said motion having come before the Honorable JOHN E. SPRIZZO, U.S.D.J., and the Court thereafter on August 22, 1988, having handed down its memorandum opinion and order (#63038); denying plaintiff's motion for partial summary judgment; granting defendants' cross-motion for summary judgment; directing the Clerk of

the Court to enter judgment accordingly and closing the above-captioned action, it is,

ORDERED, ADJUDGED AND DECREED: That the action be and it is hereby dismissed.

Appellant's Exhibit No.

A-25

DATED: NEW YORK, NEW YORK

August 24, 1988 /s/Raymond F. Burghardt

Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-26-88.

Appellant's Exhibit No.

A-27

IN THE UNITED STATES DISTRICT COURT

OF THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, Inc. and THOMAS J. GALVIN,

Defendants.

NOTICE OF APPEAL

87 CIV 2650 (JES)

Notice is hereby given that Martin A. SCHOTTENFELD, plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Opinion and Order # 63038 and Judgement of the District Court SDNY, all of them

entered on Docket on 8-26-1988, denying plaintiff's motion for partial summary judgement and granting defendants' cross-motion for summary judgement and dismissing hereby the action.
The final judgement in this action was entered on Docket on the 26-th day of August 1988.

Plaintiff - appellant,

/s/Martin A. Schottenfeld

Martin A. Schottenfeld
802 West 190-th Street Apt. 3 D
New York, N.Y. 10040

Date : September 23, 1988

Appellant's Exhibit No.

A-7

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff, 87 Civ. 2650 (JES)

against: NOTICE OF PLAINTIFF'S

CONSOLIDATED EDISON MOTION FOR PARTIAL

COMPANY OF NEW YORK, SUMMARY JUDGEMENT

Inc. and FOR PLAINTIFF

THOMAS J. GALVIN,

Defendants.

SIRS :

Please take Notice that upon the annexed affirmation in support of the Motion, affirmed on December 22, 1987, the plaintiff will move this Court, Judge John E. SPRIZZO, U.S.D.J., in Room 129,

United States Courthouse, Foley Square, New York, New York 10007, on January 8, 1988, at 4:30 PM, or at the nearest date thereafter as the Motion can be heard, to be scheduled by the Court, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting :

PARTIAL SUMMARY JUDGEMENT FOR PLAINTIFF.

New York, December 22, 1987

Plaintiff - Pro se,

/s/Martin A. Schottenfeld

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Tel. (212) 928-6785

Copies to :

- Mr. Charles E. McTiernan, Jr.
  Attorney for both defendants
  c/o Con Edison - Law Department

4 Irving Place Room 1815 S

New York, N.Y. 10003

Appellant's Exhibit No.

A-8

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff, 87 Civ. 2650 (JES)

against : PLAINTIFF'S AFFIRMATION

CONSOLIDATED EDISON IN SUPPORT OF THE

COMPANY OF NEW YORK, MOTION FOR PARTIAL

Inc. and SUMMARY JUDGEMENT

THOMAS J. GALVIN, FOR PLAINTIFF

Defendants

Martin A. Schottenfeld, plaintiff pro se, makes the following affirmation under the penalties of perjury :

I, Martin A. Schottenfeld, am the plaintiff in the above entitled case and respectfully move this Court to issue an

Order and Partial Summary Judgement granting :

1) to be determined that the plaintiff is entitled to receive a pension of $733.50 monthly, plus applicable cost-of living adjustments, effective July 1, 1986, on the basis of the formula provided in the Con Edison Retirment Plan for Management Employees, effective January 1, 1983, booklet of 40 pages, page # 5 (Exhibit P-6)

2) to obligate the defendants, jointly or each of the defendants, to pay to the plaintiff :

   a) the difference between the pension determined under (1) above and the actual pension currently paid to the plaintiff, retroactively from July 1, 1986, with interest of 9%

until 10/1/87, 10% from 10/1/87 until 1/1/88 and 11% after 1/1/88, for delayed payments;

b) the trial costs incurred to the plaintiff, in the amount of $ 400.-

3) plaintiff's claim for damages to be heard before a Jury;

4) plaintiff's claim for reasonable attorney's fees to be decided after the Jury trial.

The reason why I am entitled to the relief I seek above, is the following : The actual pension, currently paid by the defendants to the plaintiff, is far below the pension committed to by the defendants under the formula provided in the Con Edison Retirement Plan for Management Employees, effective 1/1/1983, booklet of 40 pages, page # 5, section entitled "Benefits for Participants of the Prior

Plan". There is no genuine issue to be tried on the material facts, regarding the computation of the pension under the formula provided in the Con Edison Retirement Plan for Management Employees, effective 1/1/1983, booklet of 40 pages, page # 5, section entitled "Benefits for Participants of the Prior Plan" (Exhibits P-1 and P-6) and the actual pension currently paid to the plaintiff (Exhibit P-5).

The formula provided in the Con Edison Retirement Plan for Management Employees, effective 1/1/1983 (Exhibit P-1) is in accordance with the "Determination of Accredited Service for Computation of a Pension", as provided in Con Edison Pension and Benefits Plan, effective 8/1/1975, pages 14 thru 16 (Exhibit P-2). Plaintiff is a participant of the Prior

Pension Plan (Exhibit P-3, Interrogatories Nr. 1 and 2).

The Con Edison Retirement Plan for Management Employees, effective 1/1/1983, is administered directly by the defendant Con Edison (Exhibit P-1, page # 17, sections "Plan Administration" and "Claims").

The defendant Thomas J. Galvin is an officer of Con Edison, in charge as Plan Administrator of the Con Edison Retirement Plan for Management Employees (Exhibit P-3, Interrogatories Nr. 7 and 8).

The Jurisdiction of the District Court is provided under E.R.I.S.A., Section 1132 (1) (B).

WHEREFORE, I respectfully request that the Court grant the within motion, as well as such other and further relief

that may be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 1987

/s/Martin A. Schottenfeld

Martin A. Schottenfeld

Attachments :

- Plaintiff's Statement of the facts
- 7 Exhibits with a Listing

SCHOTTENFELD vs. CON EDISON and GALVIN

District Court SDNY 87 Civ, 2650 (JES)

Appellant's Exhibit No.

A-9

PLAINTIFF'S STATEMENT OF THE MATERIAL FACTS as to which there is no genuine issue to be tried.

The plaintiff presents the following material facts, as to which there is no genuine issue to be tried :

1) The plaintiff was employed with the defendant Con Edison from June 1969, until July 1, 1986, when the plaintiff retired (Answers to the Amended complaint by both defendants).

2) The plaintiff was a participant of the Con Edison Pension and Benefits Plan prior to December 31, 1982 and a participant of the Con Edison Retirement Plan for Management

Employees subsequent to January 1, 1983 (Exhibit P-3, Interrogatory Nr. 2).

3) The Con Edison Retirement Plan for Management Employees is administered by an officer of the defendant Con Edison and by Con Edison's employees (Exhibit P-1, page 17; Exhibit P-3, Interrogatory Nr. 8).

4) The defendant Thomas J. Galvin is the Plan Administrator of the Con Edison Retirement Plan for Management Employees (Exhibit P-3, Interrogatories Nr. 7 and 8).

5) The formula of computation the pension benefits for participants of the prior pension plan is provided in Con Edison Retirement Plan for Management Employees, effective January 1, 1983, booklet of 40 pages, page # 5, Section

"Benefits for Participants of the Prior Plan" (Exhibit P-1, page 5).

6) Plaintiff's salary history is shown in Plaintiff's Personal Record (Exhibit P-4).

Plaintiff,

/s/Martin A. Schottenfeld

Martin A. Schottenfeld

Con Edison Retirement Plan for Management Employees - booklet of 40 pages - effective January 1, 1983

Appellant's Exhibit No. A-10

period 1978 through 1982. Let's also assume that Social Security for this individual amounts to $8,500 a year. Using the pension formula shown above, here's how benefits for this employee will be figured:

$16,324 (55% X $29,680) minus
- 4,250 (50% X 8,500)
$12,074 Con Edison Pension

The employee in this example will have total retirement income from the plan and from Social Security of $20,574 annually if single (Con Edison pension of $12,074 plus $8,500 of Social Security), or $24,824 if married (Con Edison pension of

$12,074, primary Social Security of $8,500, plus $4,250 of spouse's Social Security at age 65).

In this example, the employee, who is single and a resident of New York City, has take-home pay before retirement in the vicinity of $22,500 (after subtracting federal, state and local income taxes and Social Security taxes). If the employee is married, his or her take-home pay would be about $25,000. In general, after retirement, individuals are subject to lower taxes for several reasons:

- Social Security benefits are not subject currently to income taxes.
- Pension benefits are not subject to Social Security tax.
- People over age 65 qualify for an additional personal exemption.
- Although state tax laws differ,

New York State and New York City exempt the first $20,000 of pension benefits from their income tax.

As a result, retirees often keep a larger share of their gross income after they retire than while they were working. In this example, for the single employee taxes after retirement may amount to only $1,500, resulting in after-tax retirement income of $19,074 ($20,574 less $1,500), replacing about 85% of pre-retirement take-home pay of $22,500. For the married employee, taxes would be about $1,000, resulting in after-tax retirement income of $23,824, replacing about 95% of the pre-retirement take-home pay of $25,100.

Example B - 40 Years of Service

If the employee had 40 years of service at age 65, he or she would be entitled to

an additional 5% (.5% per year times 10 years) of the 5 Year Average Salary, or $1,484.

This would mean a Con Edison pension of $13,558 ($12,074 plus $1,484), and a total retirement income of $22,058 including Social Security.

Example C - 15 Years of Service

To illustrate how the plan works when the employee has less than 30 years of service, let's assume that the employee retired with only 15 years of service with the Company. In this case, his or her pension would be exactly one-half the pension determined in Example A, or $6,037

$$\frac{15}{30} \times \$12,074 = \$6,037$$

Assuming this individual had a full career of employment, he or she would still qualify for $8,500 in Social

Security income for a total retirement income of $14,537 ($6,037 plus $8,500).

Benefits for Participants of the Prior Plan

If you were an employee of the Company on December 31, 1982, whether as a management or a weekly employee and retire under this plan, you will be entitled to a minimum benefit equal to the pension you would have received under the prior plan. In other words, your pension will be calculated two ways - according to the old and new pension formulas - and you will receive whichever amount is higher. The formula retained from the prior plan is as follows:

2.2% X Total Salary

Total Salary represents your earnings for 14 years prior to retirement, plus earnings in earlier years credited at your

earnings rate in the 14th year, provided that no more than 30 years of earnings are included. For employees with more than 30 years of service, the amount determined by this formula is increased by 1.5% for each year of service over 30. For most career employees, the new formula will produce higher benefits than the prior plan formula. By way of illustration, the employee in Example A above would receive a Con Edison pension of about $10,500 under the prior plan formula as compared with $12,074 under the new formula.

Con Edison Pension and Benefits Plan, effective August 1, 1975

Appellant's Exhibit No. A-11

(3) Where service is continuous, the years of vesting service shall not be less than the total of the months and years of service for the entire period.

B. Determination of Accredited Service for Computation of a Pension.

(1) Accredited service for the computation of a pension will be the total of the months and years of service the employee was continuously in the employ of the Company in other than a temporary status. For the purpose of determining service credit, a fraction of a month will be credited as one (1)

month. Each period of accredited service will be added and the total of such service will be used in computing the pension.

(2) The period constituting a break in service will be the number of months and years the employee was not in the employ of the Company that follow the month the employee was separated from the active payroll, up to but not including the month of reemployment.

(3) Employees who have acquired ten (10) years of accredited service shall be credited with all additional years and months of service with the Company regardless of a subsequent break in service. However, no period constituting a break in service will be included in the period of accredited service for computation of a pension.

(4) An employee with less than ten (10) years of accredited service who has a break in service equal to or greater than his years of accredited service will lose such prior accredited service unless the break in service was caused by layoff or disability. However, no period constituting a break in service will be included in the period of accredited service for computation of a pension.

(5) If an allowance has been paid based upon accredited service performed prior to August 1, 1975 and such period of accredited service is included in the computation of a pension under the Plan, the actuarial present value of the pension so computed will be reduced by the total of such allowance payments. The resulting present value,

as so reduced, of the pension will be the basis for determining the monthly pension.

(6) The application of the foregoing provisions solely as they pertain to accredited service prior to the effective date of the Plan shall not be interpreted so as to reduce the years and months of accredited service which would have been used in the computation of the employee's pension under the provisions of the plans.

(7) The effect of a cash-out of vested rights on accredited service will be to deny such credit for prior service until the cash-out is fully repaid, as provided in paragraph 4 G.

(8) A participant receiving a pension or annuity under the Plan or the plans will, if reemployed after August 1,

1975, continue to receive such pension or annuity payments during the period of employment. Upon subsequent retirement, there will be payable to such participant an addition to his pension or annuity based on the service accredited from the date of reemployment. Pension or annuity payments suspended under the provisions of the plans applicable to employees who were reemployed prior to August 1, 1975 shall continue to be suspended and shall otherwise be subject to the provisions of the plans.

C. Other Service Recognized for Vesting or Computation of a Pension.

Accredited service and vesting service shall include periods of interruptions in service due to:

(1) To the extent required by

law, active military, naval, marine or related service of the United States or the State of New York, or leaves of absence granted pursuant to Company policy for World War II defense employment (1941-1946);

(2) Absence because of illness under sick leave granted; or

Con Edison's Answers to Plaintiff's First Set of Interrogatories

Appellant's Exhibit No. A-12

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1

Was Schottenfeld a management employee prior to December 31, 1982 and subsequent to January 1, 1983, until his retirement on July 1, 1986?

RESPONSE:

Yes.

INTERROGATORY NO. 2

Was Schottenfeld a participant of Con Edison Pension and Benefits Plan prior to December 31, 1982 and a participant of Con Edison Retirement Plan for Management Employees subsequent to January 1, 1983?

RESPONSE:

Yes.

INTERROGATORY NO. 3

Is the Con Edison Retirement Plan for Management Employees, edited in 1983, currently in effect?

RESPONSE:

Con Edison objects to this interrogatory on the ground that it is so vague, indefinite, and uncertain as not to be

Pension and Benefits Plan, edition July 1984, up to date?

RESPONSE:

To the extent this interrogatory seeks information relating to the Consolidated Edison Pension and Benefits Plan, Con Edison objects to this interrogatory on the ground that such informa-

tion is not relevant to the subject matter of this lawsuit, and that the interrogatory is not reasonably calculated to lead to the discovery of admissible evidence, and is vague and ambiguous.

Subject to the foregoing objection, Con Edison states that, to the extent this interrogatory refers to the Consolidated Edison Pension and Benefits Plan, adopted effective August 1, 1975, and as subsequently amended, that plan has been amended effective January 1, 1983, and later amended by Amendment No. 1, dated May 3, 1984, Amendment No. 2, dated May 9, 1984, Amendment No. 3, dated September 12, 1985, Amendment No. 4, dated Apil 9, 1986, Amendment No. 5, dated October 15, 1986, Amendment No. 6, dated July 15, 1987, Amendment No. 7,

dated July 27, 1987, and Amendment No. 8, dated August 6, 1987.

INTERROGATORY NO. 7

Is Galvin the Vice President Employee Relations of Con Edison?

RESPONSE:

Yes.

INTERROGATORY NO. 8

Is the Vice President Employee Relations of Con Edison the Plan Administrator of the Con Edison Retirement Plan for Management Employees and of the Con Edison Pension and Benefits Plan?

RESPONSE:

Yes.

INTERROGATORY NO. 9

Are the retirement pension benefits under the Con Edison Retirement Plan for Management Employees, as well as under the Con Edison Pension and Benefits Plan,

determined by Con Edison employees of the Con Edison Retirement Programs Section?

RESPONSE:

To the extent this interrogatory seeks information relating to the determination of benefits under the Consolidated Edison Pension and Benefits Plan, Con Edison objects to this interrogatory on the ground that such information is not relevant to the subject matter of this lawsuit, and that the interrogatory is not reasonably calculated to lead to the discovery of admissible evidence and is unduly burdensome.

Subject to the foregoing objection, Con Edison states that retirement pension benefits under the Consolidated Edison Retirement Plan for Management Employees and the Consolidated

Appellant's Exhibit No.

A-15

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, Inc. and THOMAS J. GALVIN,

Defendants

87 Civ. 2650 (JES)

PLAINTIFF'S MEMORANDUM TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT FOR PLAINTIFF

PLAINTIFF'S MEMORANDUM

connected with plaintiff's Motion for Partial Summary Judgement for Plaintiff

On plaintiff's Motion for Partial Summary Judgement for plaintiff, introduced on

December 22, 1987, Exhibit P-6 "Computation of Plaintiff's Retirement Pension", was made a slight mathematical error. The "Pivot Year" applicable should be the year 1973 - not the year 1972, as calculated by error.

In conformity with the Con Edison Pension and Benefits Plan, effective 8/1/75, the six months worked by plaintiff in 1986 - January 1, 1986 thru July 1, 1986 - are to be considered as one full year of service.(page 4 of Con Edison Pension and Benefits Plan, effective 8/1/1975). Therefore, the pivot year, that means the 14th year prior to retirement, should be the year 1973.

Plaintiff respectfully asks, that Exhibit P-6 to above plaintiff's Motion should be replaced with the attachd Exhibit P-6A.

Part (1) of the relief prayed for in the

above Motion to be granted, should be read correctly :

(1) to be determined that the plaintiff is entitled to receive a pension of $740.04 monthly, plus applicable cost-of-living adjustments, effective July 1, 1986, on the basis of the formula provided in the Con Edison Retirement Plan for Management Employees effective January 1, 1983, booklet of 40 pages, page # 5 (Exhibit P-6A).

All the other parts of the Relief prayed for on plaintiff's Motion for Partial Summary Judgement for plaintiff, introduced on December 22, 1987, remain unchanged.

January 4, 1988

Plaintiff,

/s/Martin A. Schottenfeld

P57

Martin A. Schottenfeld

SCHOTTENFELD vs. CON EDISON and GALVIN

District Court SDNY 87 Civ. 2650 (JES)

Appellant's Exhibit No.

A-16

Revised Computation of Plaintiff's Retirement Pension

under the Formula provided in the Con Edison Retirement Plan for Management Employees, effective January 1, 1983, booklet of 40 pages, page # 5, Section entitled "Benefits for Participants of the Prior Plan".

1986 - 36,700 x .083333 x 6 mos.

(1) Current Year Salary 18,350

85 - 36,700

84 - 35,700

83 - 34,000

82 - 32,000

81 - 29,800

80 - 27,400

79 - 25,300

(2) 14 Year Total 351,700

78 - 23,725

77 - 20,725

76 - 19,400

75 - 17,800

74 - 16,300

73 - 14,500 Pivot Year

Pivot 72 - 14,500

Sala- 71 - 14,500

ries 70 - 14,500

69 - 14,500 x .083333 x 7 mos.

8,548

(3) Pivot Year Total 51,958

(4) Total Salary Prior to Retirement 403,658

x 02.2

(5) Annual Basic Pension 8,880.48

(6) Monthly Basic Pension $ 740.04

Note: Applicable cost-of-living adjustments should be added to the Monthly Basic Pension, determined under (6) above.

Plaintiff,

/s/Martin A. Schottenfeld

Martin A. Schottenfeld

P61 P-5

Appellant's Exhibit No.

A-14

OLD "TOTAL SALARY" FORMULA

1984 - $34,000 x .083333 x 7 mos. =

19,833 (1) Current Year Total

83 - 34,000

82 - 32,000

81 - 29,800

80 - 27,400

79 - 25,300

78 - 23,725

77 - 20,725

76 - 19.400 - =

298,450 (2) 14 Year Total

75 - 17,800

74 - 16,300

73 - 14,500

72 - 13,500

71 - 12,500

70 - 11,500

69 - (11,500) x .083333 x 7 mos. =

6,708 (3) Pivot Year Total

(pivot salary)

324.991 (4) Total Wages

x 022

7,149.80 (5) Annual Pension

595.82 (6) Monthly Pension

Martin A. Schottenfeld

#27083

Appellant's Exhibit No.

A-19

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,)

Plaintiff, 87 Civ. 2650 (JES)

- against - DEFENDANTS

CONSOLIDATED EDISON RULE 3(g))

COMPANY OF NEW YORK, INC., STATEMENT

and THOMAS J. GALVIN,

Defendants.

Defendants, Consolidated Edison Company of New York, Inc. ("Con Edison"), and Thomas J. Galvin, pursuant to Rule 3(g) of the Local Rules of this Court, submit this statement of material facts as to which defendants contend there is

no genuine issue to be tried.

1. Plaintiff was born on July 18, 1919.

2. Plaintiff commenced employment as a management employee with defendant Consolidated Edison Company of New York, Inc., on June 30, 1969 and was continuously employed until he retired on July 1, 1986.

3. Plaintiff was a participant in the Consolidated Edison Pension and Benefits Plan on and prior to December 31, 1982, and a participant in the Consolidated Edison Retirement Plan for Management Employees subsequent to January 1, 1983.

4. Defendant Thomas J. Galvin is the Plan Administrator for the Consolidated Edison Retirement Plan for Management Employees and is also an officer of

Consolidated Edison Company of New York, Inc.

5. The Consolidated Edison Retirement Plan for Management Employees contains a formula for computing pension benefits of management employees who were participants in the Pension and Benefits Plan on December 31, 1982.

6. Plaintiff's salary history is as shown in plaintiff's Exhibit P-4 to his Motion for Partial Summary Judgment.

7. Prior to his retirement plaintiff received a copy of the January 1, 1983 Summary Plan Description booklet for the Consolidated Edison Retirement Plan for Management Employees but never asked to examine the official plan text of the Consolidated Edison Retirement Plan for Management Employees.

8. The Consolidated Edison Retire-

ment Plan for Management Employees does not provide credit for benefit calculation purposes for any employment beyond age 65.

9. Plaintiff was notified on several occasions prior to his retirement that the Consolidated Edison Retirement Plan for Management Employees does not provide credit for employment beyond age 65.

Dated: New York, New York
February 12, 1988

/s/Charles E. McTiernan, Jr.
CHARLES E. MCTIERNAN, JR.
Attorney for Defendants
Consolidated Edison
Company of New York, Inc.
and Thomas J. Galvin

4 Irving Place, Room 1815S

New York, New York 10003

(212) 460-2432

Of Counsel:

JONATHAN A. FIELDS,

(212) 460-3990

To: MARTIN A SCHOTTENFELD

Plaintiff pro se

802 West 190th Street, Apt. 3D

New York, New York 10040

(212) 928-6785

Appellant's Exhibit No.

A-22

IN THE UNITED STATES DISTRICT COURT

OF THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff,

vs. 87 Civ. 2650 (JES)

CONSOLIDATED EDISON

COMPANY OF NEW YORK,

Inc. and

THOMAS J. GALVIN,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW

I. IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGEMENT

II. IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR

PARTIAL SUMMARY JUDGEMENT

III. IN SUPPORT FOR PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT.

Plaintiff, Martin A. Schottenfeld, submits this Memorandum of Law in opposition to defendants' Cross Motion for Summary Judgement, in response to defendants opposition to plaintiff's Motion for Partial Summary Judgement and in support for plaintiff's Motion for Partial Summary Judgement.

I. IN OPPOSITION TO DEFENDANTS CROSS MOTION FOR SUMMARY JUDGEMENT

A. Plaintiff objects to some of defendants' Exhibits.

Plaintiff objects to the following exhibits attached by defendants to the Cross Motion for Summary Judgement, for the reasons shown below:

1. Letter - Memo dated 10/25/1979 - Exhibit B.
   This document is unknown to plaintiff. Plaintiff has never received this letter, as clearly stated on plaintiff's deposition of 10/26/87.
2. Con Edison Restated Pension and Benefits Plan, as amended in September 1980 - Exhibit C.
   This document is unknown to plaintiff. The amendments to the 1975 Pension Plan are not applicable to plaintiff, who is a participant of the 1975 Con Edison Pension and Benefits Plan.
3. Con Edison Retirement Plan for Management Employees, effective 1/1/83 - book of 64 pages - Exhibit D.

This edition of the 1983 Con Edison Retirement Plan for Management Employees, book of 64 pages, is unknown to plaintiff, as clearly stated on plaintiff's deposition of 10/26/87, page 38, defendants' Exhibit J.

This document contains amendments to the 1975 Con Edison Pension and Benefits Plan, which amendments are not applicable to plaintiff, who is a participant of the 1975 Pension and Benefits Plan.

4. Con Edison Retirement Plan for Management Employees, effective 1/1/1983, with amendments to April 1986 - book of 64 pages - Exhibit F. This document is unknown to plaintiff and contains amendments to the 1975 Con Edison Pension and Benefits

Plan, which amendments are not applicable to plaintiff, as shown under (3) above.

5. Con Edison letter - Memo dated 4/10/1984 - Exhibit H.

This document is unknown to plaintiff. Plaintiff has never received this letter, as clearly stated on plaintiff's deposition of 10/26/1987.

Plaintiff respectfully asks that above documents, unknown to the plaintiff, be set aside and considered out of the record and out of the file.

6. Parts of the 1975 Con Edison Pension and Benefits Plan - Exhibit A.

Defendants have presented as Exhibit A only 6 pages of the 1975 Con Edison Pension and Benefits Plan, which are not strictly relevant to this case. Defendants have carefully omitted to

present the pages 14, 15 and 16 of the Con Edison Pension and Benefits Plan, effective 8/1/1975, showing the "Determination of Accredited Service for Computation of a Pension", which pages are strictly relevant in this case.

The pages 14, 15 and 16 of the Con Edison Pension and Benefits Plan, effective 8/1/1975, were presented by plaintiff as Exhibit P-2.

Defendants have omitted to make up and to present a listing of all the exhibits attached to defendants Cross Motion for Summary Judgement. In the case discrepancies will appear, plaintiff reserves the right to present eventually additional objections.

B. Defendants' Cross Motion for Summary Judgement is

inadmissible.

Defendants have inserted on the Statement made up in conformity with the Local Rule 3 (g), under (8) and (9) of this Statement, untrue allegations as "facts". Defendants' allegations made under (8) of this Statement, that the Con Edison Retirement Plan for Management Employees "does not provide credit for benefit calculation purposes for any employment beyond age 65", is untrue.

The Con Edison Retirement Plan for Management Employees, effective 1/1/1983, booklet of 40 pages, provides clearly that the old formula, reproduced in detail from the prior 1975 Con Edison Pension and Benefits Plan, on page 5 of the booklet, defining the "Total Salary prior to Retirement", will continue to be applied to participants of the prior 1975

Con Edison Pension and Benefits Plan. The plaintiff is a participant of the prior 1975 Con Edison Pension and Benefits Plan, as recognized by defendants under (3) and (5) of defendants' Rule 3 (g) Statement. Therefore, the old formula of the 1975 Pension Plan, reproduced on the Retirement Plan for Management Employees, effective 1/1/83, booklet of 40 pages, page 5 of this booklet, is applicable to plaintiff (Exhibit P-1 and also defendants' Exhibit I).

Defendants' allegation made under (9) of defendants' Rule 3 (g) Statement, that the plaintiff would have been "notified on several occasions that the Con Edison Retirement Plan for Management Employees does not provide credit for employment beyond age 65" is untrue.

True is, that on 4/24/1984, a defendants'

representative has requested from the plaintiff to consent to a cut of retirement benefits, by limiting the Total Salary to age 65 and to sign a correspondent letter. Plaintiff has not consented to the cuts of benefits and has signed the letter with the clear words, "I disagree". Defendants have never responded to plaintiff's clearly expressed disagreement (defendants' Exhibit E).

Defendants' insertion of untrue allegations as "facts", under (8) and (9) of defendants' Rule 3 (g) Statement, makes defendants Cross Motion for Summary Judgement ab initio inadmissible.

C. The Affidavit of Sheldon E. Reichard, dated February 12, 1988, contains untrue allegations of "fact" and

erroneous interpretations of law.

The Affidavit of Sheldon E. Reichard, which was made up by defendants in view of defendants' Cross Motion for Summary Judgement, contains untrue allegations of "fact" and erroneous interpretations of law.

The allegation made by Mr. Reichard under (11) on page 7 of Mr. Reichard's Affidavit, that "the pension plans in which plaintiff participated did not provide credit for an employee's continued employment beyond age 65" is untrue. The 1975 Con Edison Pension and Benefits Plan, of which plaintiff is a participant, provides clearly under "Determination of Accredited Service for Computation of a Pension", pages 14 through 16 of the 1975 Con Edison Pension Plan, that

all the years and months of continuous service with the Company, other than on a temporary status, will be accredited for the computation of a pension (Exhibit P-2). But Mr. Reichard contended under (13) on page 9 of the Affidavit, that "Exhibit P-2 is based on an obsolete and inapplicable version of the 1975 pension plan." This interpretation of law made by Mr. Reichard is totally erroneous and irresponsible. The defendants have carefully omitted to present the pages 14 thru 16 of the 1975 Pension Plan with defendants' Exhibit A. Furthermore, the Con Edison Retirement Plan for Management Employees, effective 1/1/1983, booklet of 40 pages, provides clearly that the old formula of the prior 1975 Pension Plan, reproduced in detail on page 5 of the booklet, will continue to be applied to

participants of the prior 1975 Pension Plan. The old formula provides the computation of the pension on the basis of the "Total Salary prior to retirement" (Exhibit P-1 and also defendants' Exhibit I, page 5). Mr. Reichard's allegation that plaintiff would have been advised "on a number of occasions" that employees cease to accrue credits for pension purposes at age 65 (number 12, page 7, of Mr. Reichard's Affidavit) is untrue. The Affidavit of Mr. Reichard contains erroneous interpretations of law, including Mr. Reichard's misinterpretation of the clear formula for computation of pension benefits for participants of the Prior Pension Plan, provided in detail on Con Edison Retirement Plan for Management Employees, effective January 1, 1983, booklet of 40 pages, page 5 (Exhibit P-1

and also defendants' Exhibit I).

Mr. Reichard's interpretations that the amendments to the 1975 Pension Plan, which amendments were made unilaterally by defendants, would be applicable to plaintiff, who is a participant of the 1975 Con Edison Pension and Benefits Plan, are erroneous.

Due to the numerous untrue allegations of "fact" and erroneous interpretations of law, contained in the Affidavit of Mr. Reichard, plaintiff respectfully asks that the Affidavit of Sheldon E. Reichard be set aside and disregarded.

II. IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT

A. The amendments to the 1975 Pension and Benefits Plan are not applicable to

plaintiff

The 1975 Con Edison Pension and Benefits Plan is the only complete plan document applicable to plaintiff, who is a participant of the prior 1975 Con Edison Pension Plan, effective August 1, 1975. Pages 14 thru 16 of the 1975 Con Edison Pension Plan provide in detail the "Determination of Accredited Service for Computation of a Pension" (Exhibit P-2). The only requirement for accredited service for computation of a pension is that the employee has performed the service on a continuous basis and in other than a temporary status. This requirement was met by plaintiff, as recognized by the defendants.

The validity of the old formula of computation pension benefits, provided in the 1975 Con Edison Pension and Benefits

Plan, was confirmed by defendants in the 1983 Con Edison Retirement Plan for Management Employees, effective 1/1/1983, booklet of 40 pages, page 5, by providing that the old formula of computation benefits will continue to be applied to participants of the Prior Plan (Exhibit P-1 and also defendants' Exhibit I). Defendants' contention that the amendments to the 1975 Pension Plan, made unilaterally by defendants, would be applicable to the plaintiff, who is a participant of the 1975 Con Edison Pension and Benefits Plan, is totally erroneous.

The amendments to the 1975 Pension Plan, like the 1980 "Restated Plan" and the new 1983 Con Edison Retirement Plan for Management Employees, as well as other amendments made by defendants unilater-

ally to the 1975 Pension Plan, prior to plaintiff's retirement, are not applicable to plaintiff.

B. Legal Argument

The defendants have made intensive and extensive efforts to search for discrepancies between the two editions of the 1983 Con Edison Retirement Plan for Management Employees, effective January 1, 1983 - the booklet of 40 pages, called by defendants "Summary Plan Description Booklet" and the book of 64 pages, called by defendants "Official Plan Text".
The only edition of the 1983 Con Edison Retirement Plan for Management Employees, effective January 1, 1983, known to the plaintiff, is the booklet of 40 pages, which was distributed to all the management employees, including to the plaintiff (defendants' Exhibit I).

The book of 64 pages was not distributed to the employees, as recognized by defendants.

Both editions of the 1983 Con Edison Retirement Plan for Management Employees - the book, as well as the booklet - contain amendments to the prior 1975 Con Edison Pension and Benefits Plan, reducing the pension benefits. Therefore, both editions of the 1983 Con Edison Retirement Plan for Management Employees, which contain amendments to the 1975 Pension Plan, which amendments were made unilaterally by defendants, are not applicable to plaintiff, who is a participant of the 1975 Con Edison Pension and Benefits Plan.

Defendants' intensive and extensive efforts to search for discrepancies between the two editions of the 1983

Retirement Plan for Management Employees, are useless, because the amended provisions of the 1983 Retirement Plan for Management Employees cannot be applied to plaintiff, who is a participant of the 1975 Con Edison Pension and Benefits Plan.

The amendments to the 1975 Pension and Benefits Plan can be applied only to future employees, who were or will be hired after the respective dates of those amendments, made unilaterally by defendants.

The only complete plan document applicable to plaintiff is the 1975 Con Edison Pension and Benefits Plan.

III. IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT

A. There are no genuine issues of facts to be tried

Plaintiff's Statement of the material facts, under Rule 3 (g), attached to plaintiff's Motion for Partial Summary Judgement, is correct.

Defendants have recognized that there are not in dispute any material factual issues (defendants' Opposition to plaintiff's Motion for Partial Summary Judgement, page 1).

B. Plaintiff's computation of the due pension, on Exhibit P-6A, is correct

The computation of plaintiff's due pension, on Exhibit P-6A, is based on the formula provided on the 1983 Con Edison Retirement Plan for Management Employees, effective 1/1/1983, page 5 (Exhibit P-1, also defendants' Exhibit I) and is correct.

x x

x

Conclusion

For the foregoing reasons, plaintiff respectfully asks to be granted plaintiff's Motion for Partial Summary Judgement and to be denied defendants' Cross Motion for Summary Judgement.

Plaintiff,

/s/Martin A. Schottenfeld
Martin A. Schottenfeld
802 West 190 Street Apt. 3 D
New York, N.Y. 10040
Tel. (212) 928-6785

Appellant's Exhibit No.

A-23

IN THE UNITED STATES DISTRICT COURT

OF THE SOUTHERN DISTRICT OF NEW YORK

MARTIN A. SCHOTTENFELD,

Plaintiff,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, Inc. and THOMAS J. GALVIN,

Defendants.

87 Civ. 2650 (JES)

AFFIDAVIT OF MARTIN A. SCHOTTENFELD, IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF LAW

Filed on March 11, 1988.

MARTIN A. SCHOTTENFELD, being duly sworn, deposes and says:

a) I am the plaintiff in the above captioned case.

b) I certify herewith that all the

statements I made in the PLAINTIFF'S MEMORANDUM OF LAW (1) IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGEMENT (2) IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT AND (3) IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT, filed on March 11, 1988, are true and correct.

/s/Martin A. Schottenfeld
Martin A. Schottenfeld
802 West 190 Street, Apt. 3D
New York, N.Y. 10040
Tel. (212) 928-6785

Appellant's Exhibit No.

A-26

Con

Edison MEMORANDUM

January 1984

TO: Employees Attaining Age 65

FROM: Harry Terhune, Jr.

/s/Harry Terhune, Jr.

SUBJECT: Pension Credit for Service After Attaining Age 65

Age Discrimination in Employment Act amendments of 1978 (ADEA), in most cases, permit continued employment after the attainment of age 65.

As permitted by the law, you will not accrue pension credit after your normal retirement date, which at Con Edison is the first day of the month following your

attainment of age 65.

The pension benefits you earned to your normal retirement date will be suspended until your actual retirement date. However you will be eligible when you retire to all benefit improvements occurring between your normal retirement date and your actual retirement date.

You are required by the law to sign this memorandum, a copy of which will be provided to you, acknowledging that you have been informed that you will not accrue pension credit beyond your normal retirement date.

Any questions on this memorandum can be addressed, in writing, to Manager, Retirement Programs, Benefits Planning and Administration, Room 947-S, 4 Irving Place.

I acknowledge that I have read and under-

stand this memorandum.

Martin A. Schottenfeld

NAME PRINTED

27083

I disagree

/s/Martin A. Schottenfeld

SIGNATURE OF EMPLOYEE

4-24-1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARTIN A. SCHOTTENFELD,)

Plaintiff - Appellant)

Docket Number

88-7827

against)

CONSOLIDATED EDISON COMPANY OF NEW YORK,)

INC.)

and)

THOMAS J. GALVIN,)

Defendants - Appellees)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF - APPELLANT

MARTIN A. SCHOTTENFELD

ISSUES PRESENTED FOR REVIEW

1. Are the Order and the Judgement of the District Court, granting defendants'-appellees' Cross-Motion for Summary Judgement, legally erroneous?
2. Are the Order and the Judgement of the District Court, denying plaintiff's-appellant's Motion for Partial Summary Judgement and dismissing the action, legally erroneous?

STATEMENT OF THE CASE

Plaintiff-appellant's action was brought under Section 1132 (a) (1) (B) of the Employee Retirement Income Security Act (E.R.I.S.A.) of 1974, with subsequent modifications, Title 29 U.S.C.A.
The plaintiff-appellant is a retired employee of the defendant-appellee Consolidated Edison Company of New York, Inc. The second defendant-appellee, Thomas J. Galvin, is the Plan Administrator of the Retirement Plan for Management Employees of the defendant Con Edison. Section 1132 (a) (1) (B) of E.R.I.S.A. provides, that pension benefits promised in a pension plan are enforceable. The 1975 Pension and Benefits Plan of the defendants-appellees provides a clear definition of the accredited service for the computation of a retirement pension,

promising that "Accredited service for the computation of a pension will be the total of the months and years of service the employee was continuously in the employ of the Company in other than a temporary status" (Exhibit A-11, page 14, lines 6-12). The definition of the Accredited Service, provided clearly in the 1975 Con Edison Pension and Benefits Plan (Exhibit A-11, page 14, lines 6-12) does not mention any restriction or limitation by age. The defendants argue, that amendments were made to the 1975 Con Edison Pension and Benefits Plan, including the 1983 Retirement Plan for Management Employees, limiting the accredited service to age 65, stating also that the 1975 Con Edison Pension and Benefits Plan, which provides a clear and binding definition of the "Accredited service for

the computation of a pension" would have become "obsolete" (Exhibit A-20, Affidavit of Sheldon E. Reichard, page 9, lines 31-32). The plaintiff-appellant has retired from the defendant Con Edison on 7/1/86, at age 67.

Plaintiff-appellant's argument, that the amendments to the 1975 Con Edison Pension and Benefits Plan, made unilaterally by the defendants, reducing the benefits, without the consent of the participants of the prior 1975 Pension and Benefits Plan, cannot be applied to the participants of the prior 1975 Pension and Benefits Plan (Exhibit A-22, page 6, lines 21-28), was entirely omitted to be considered by the District Court.

The District Court has embraced defendants'-appellees' argument, that the amendments to the 1975 Con Edison Pension

and Benefits Plan, made unilaterally by the defendants, would be applicable to the plaintiff-appellant who is a participant of the prior plan (Exhibit A-24, page 2, lines 12-21; page 3, lines 1-6).

The District Court has also omitted to consider plaintiff's-appellant's objections to some of defendants' exhibits, which are unknown to plaintiff-appellant and has not decided on this matter (Exhibit A-22, pages 1 and 2, the entire section (I) (A)).

The District Court has also omitted to consider and to decide on plaintiff's-appellant's argument of inadmissibility of defendants'-appellees' Cross-Motion for Summary Judgement under Rule 56 of the Federal Rules of Civil Procedure (Exhibit A-22, page 3 - the entire page).

Furthermore, the District Court has

omitted to consider and to decide on plaintiff's-appellant's request to be set aside and disregarded the Affidavit of Sheldon E. Reichard, dated February 12, 1988 (Exhibit A-20, all the 11 pages), due to the fact that this affidavit contains untrue allegations of "fact" and erroneous interpretations of law, specified in detail by the plaintiff-appellant (Exhibit A-22, the entire pages 4 and 5; Exhibit A-23, the entire affidavit on one page).

On top of all the omissions mentioned above, the District Court has totally overseen defendants'-appellees' failure to comply with the Order of the District Court, dated 1/13/88, entered on Docket on 1/26/88, by not replying to plaintiff's-appellant's opposition to defendants'-appellees' Cross-Motion on or

before 4/8/88 and by not requesting any extension of time for this purpose (Exhibit A-17, lines 10-11).

With the Memorandum Opinion and Order dated August 19, 1988 and the Judgement dated August 24, 1988, entered on Docket on 8/26/88, the District Court has granted defendants'-appellees' Cross-Motion for Summary Judgement, has denied plaintiff's-appellant's Motion for Partial Summary Judgement and has dismissed the action (Exhibit A-24; Exhibit A-25).

Plaintiff-appellant has filed the Notice of Appeal on 9/23/88 (Exhibit A-27).

STATEMENT OF FACTS

The appellant was continuously employed with the appellee Con Edison from June 1969, until July 1, 1986, when the appellant retired at the age of 67. The appellant was born on July 18, 1919 (Exhibit A-13, page 1, line 3; page 2, last line).

During the time of employment, the appellant became a participant of the 1975 Con Edison Pension and Benefits Plan and also a participant of the 1983 Con Edison Retirement Plan for Management Employees (Exhibit A-12, page 2, Interrogatory No. 2).

The appellee Thomas J. Galvin is the Plan Administrator of the Con Edison Retirement Plan for Management Employees and of the Con Edison Pension and Benefits Plan (Exhibit A-12, Interrogatories 7 and 8).

Appellant's salary history is shown on appellant's Personal Record sheet (Exhibit A-13, both pages).

The definition of the "Accredited service for the computation of a pension" is provided in the 1975 Con Edison Pension and Benefits Plan, on page 14, Section (B) (1) (Exhibit A-11, lines 4-12 on page 14). The accredited service promised by the appellees in this clear definition, will be the total of the months and years of service the employee was continuously in the employ of the Company in other than a temporary status. This clear definition of the accredited service for the computation of a pension does not mention any limitation by age.

The appellees have amended unilaterally the 1975 Con Edison Pension and Benefits Plan several times, including in 1983

with the issuance of the new Retirement Plan for Management Employees, effective January 1, 1983. In those amendments of the 1975 Con Edison Pension and Benefits Plan, made by the appellees unilaterally subsequent to 1975, the appellees have indeed reduced the benefits promised in the 1975 Pension and Benefits Plan and have limited the accredited service to age 65.

But even in the new 1983 Con Edison Retirement Plan for Management Employees, booklet of 40 pages, the appellees have promised on page 5, under the heading "Benefits for participants of the prior Plan", that the old formula of the 1975 prior pension plan, based on the "Total Salary Prior to retirement" will continue to be applied to the participants of the prior 1975 Pension and Benefits Plan

(Exhibit A-10, page 5, chapter under the heading "Benefits for Participants of the Prior Plan").

The booklet of 40 pages of the 1983 Con Edison Retirement Plan for Management Employees, is the only edition of the 1983 Con Edison Retirement Plan for Management Employees, distributed to the employees, including to the appellant. The book of 64 pages of the 1983 Con Edison Retirement Plan for Management Employees, edited by the appellees, was never distributed to the employees, as recognized by the appellees and is unknown to the appellant (Exhibit A-22, page 2, numbers 3 and 4).

The appellees have recognized that the "material factual issues", presented by appellant on appellant's "Statement of the material facts" under Rule 3 (g),

(Exhibit A-9), are not in dispute (Exhibit A-21, page 1, line 10). But the appellees have added, on appellees Rule 3 (g) Statement, under (8) and (9), allegations as "facts", which are untrue and are contradicted by the appellant (Exhibit A-19, page 2, numbers (8) and (9); Exhibit A-22, page 3, the entire page).

The District Court has omitted to consider and to decide on appellant's argument of inadmissibility of appellees' Cross-Motion for Summary Judgement under Rule 56 of the Federal Civil Procedure (Exhibit A-22, page 3, last 3 lines).

In the Memorandum Opinion and Order, dated August 19, 1988, the District Court has incorrectly stated that the "material facts are not in dispute" (Exhibit A-24, page 1, line 13). As shown above, some

allegations on appellees' Rule 3 (g) Statement are untrue and contradicted by appellant, but the District Court has omitted to consider and to decide on this matter (Exhibit A-22, page 3, the entire page).

REASONS FOR APPEAL

1. OMISSION TO BE CONSIDERED AND TO BE ACTED UPON APPELLEES' FAILURE TO COMPLY WITH THE DISTRICT COURT'S ORDER dated 1/13/88, entered on Docket on 1/26/88.

With the Order dated 1/13/88, entered on the Docket on 1/26/88, the District Court has ordered that defendants-appellees should reply to plaintiff-appellant's response to defendants'-appellees' Cross-Motion for Summary Judgement on or before April 8, 1988 (Exhibit A-17, lines 10-11).

Defendants-appellees have failed to comply with the District Court's Order dated 1/13/88 and have not requested any extension of time for this purpose. Defendants'-appellees' presentation of the reply to plaintiff-appellant's oppo-

sition to defendants'-appellees' Cross-Motion for Summary Judgement on the date scheduled for the Oral Argument (on June 10, 1988), made it impossible to the plaintiff-appellant to present the Oral Argument properly.

The District Court has totally overseen defendants'-appellees' failure to comply with the Order dated 1/13/88 (Exhibit A-17, lines 10-11) and has not considered and not acted upon this matter. Defendants'-appellees' Cross-Motion for Summary Judgement should have been dismissed for defendants'-appellees' failure to comply with the District Court's Order dated 1/13/88 (Exhibit A-17, lines 10-11).

2. <u>OMISSION TO BE CONSIDERED AND TO BE DECIDED UPON APPELLANT'S ARGUMENT OF INADMISSIBILITY OF</u>

APPELLEES' CROSS-MOTION FOR SUMMARY JUDGEMENT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The appellant has presented and proven in detail the argument that appellees' Cross-Motion for Summary Judgement is inadmissible under Rule 56 of the Federal Rules of Civil Procedure, because the appellees have inserted under (8) and (9) of appellees' Rule 3 (g) Statement untrue allegations as "facts", which were disputed and contradicted by the appellant (Exhibit A-22, page 3 - the entire page). Note 203 to Rule 56 of the Federal Rules of Civil Procedure, U.S.C. 28, cites numerous decisions of higher Federal Courts, stating that summary judgements are inadmissible when any material facts are in dispute.

The District Court has based the Memorandum Opinion and Order # 63038 (Exhibit A-24) on the untrue allegations presented as "facts" under (8) and (9) of defendants'-appellees' Rule 3 (g) Statement and has omitted to consider and to decide upon appellant's argument of inadmissibility of defendants'-appellees' Cross-Motion for Summary Judgement under Rule 56 of the Federal Rules of Civil Procedure, presented and proven in detail by appellant (Exhibit A-22, page 3 - the entire page).

3. <u>OMISSION TO BE CONSIDERED AND TO BE DECIDED UPON APPELLANT'S OBJECTIONS TO SOME OF APPELLEES' EXHIBITS, WHICH ARE UNKNOWN TO APPELLANT</u>.

The appellant has objected against a number of 5 Exhibits presented by the

apellees with appellees' Cross-Motion for Summary Judgement, which exhibits are unknown to appellant and has requested that those 5 Exhibits, unknown to appellant, be set aside and considered out of the record and out of the file (Exhibit A-22, page 1, lines 11-21; page 2, lines 1-18). The District Court has omitted to consider appellant's objections and appellant's request to be set aside and disregarded those documents, which are unknown to the appellant.

4. 0MISSION TO BE CONSIDERED AND TO BE DECIDED UPON APPELLANT'S REQUEST TO BE SET ASIDE AND DISREGARDED THE AFFIDAVIT OF SHELDON E. REICHARD, dated February 12, 1988 (Exhibit A-20), WHICH AFFIDAVIT CONTAINS UNTRUE ALLEGATIONS OF "FACT" AND

ERRONEOUS INTERPRETATIONS OF LAW.

The appellant has proven in detail that numerous allegations of "fact" made in the affidavit of Sheldon E. Reichard, dated February 12, 1988, are untrue and that interpretations of the law, made by Mr. Reichard in this affidavit, are erroneous and has requested that the affidavit of Sheldon E. Reichard, dated February 12, 1988, be set aside and disregarded (Exhibit A-22, page 4 - the entire page; page 5 - the entire page; Exhibit A-20 - all the 11 pages; Exhibit A-23 - the entire page).

The District Court has omitted to consider and to decide upon appellant's request to be set aside and disregarded the affidavit of Sheldon E. Reichard, dated February 12, 1988.

Moreover, the District Court has based the Memorandum Opinion and Order # 63038 (Exhibit A-24) on the disputed affidavit of Sheldon E. Reichard, dated February 12, 1988, citing untrue allegations contained in this affidavit (Exhibit A-24, page 3, lines 1-6, lines 15-19).

5. <u>OMISSION TO BE CONSIDERED AND TO BE DECIDED UPON APPELLANT'S ARGUMENT, THAT THE AMENDMENTS TO THE 1975 CON EDISON PENSION AND BENEFITS PLAN, WHICH WERE MADE UNILATERALLY BY THE APPELLEES, REDUCING THE BENEFITS, ARE NOT APPLICABLE TO THE APPELLANT, WHO IS A PARTICIPANT OF THE 1975 PRIOR PLAN</u>.

The appellees made unilaterally amendments to the 1975 Pension and Benefits Plan, reducing the benefits, among others

by limiting the accredited service to age 65. Those amendments were made by the appellees without the consent of the participants of the Prior 1975 Plan and therefore cannot be applied to the participants of the prior 1975 Pension and Benefits Plan. In fact, the appellees have recognized that those amendments, reducing the benefits, will not be applied to the participants of the prior 1975 Pension and Benefits Plan, by providing in the new 1983 Con Edison Retirement Plan for Management Employees, that the old formula of computation of the retirement benefits, based on the "TOTAL SALARY PRIOR TO RETIREMENT", will continue to be applied to the participants of the prior 1975 Pension and Benefits Plan (Exhibit A-10, page 5, "Benefits for Participants of the Prior Plan").

The District Court has not considered the argument presented by the appellant, that the amendments to the 1975 Con Edison Pension and Benefits Plan, made unilaterally by the appellees without the consent of the participants of the prior 1975 Pension and Benefits Plan, are not applicable to the participants of the prior 1975 Pension and Benefits Plan (Exhibit A-22, page 6, lines 15-28).

In addition to the omission to consider and to decide upon appellant's argument mentioned above, regarding the non-applicability of the amendments to the 1975 Con Edison Pension and Benefits Plan to participants of the prior 1975 Pension and Benefits Plan, the District Court has based the Memorandum Opinion and Order # 63038 on those amendments and has applied those amendments to the appellant

(Exhibit A-24, page 4, lines 4-13). Furthermore, the District Court has connected the clear provision of the 1983 Retirement Plan for Management Employees, page 5, booklet of 40 pages (Exhibit A-10), with the amendments to the 1975 Pension and Benefits Plan, contained in the 1983 Retirement Plan for Management Employees, this way annihilating the special provision of "Benefits for Participants of the Prior Plan" shown on page 5 of the booklet of 40 pages of the 1983 Con Edison Retirement Plan for Management Employees (Exhibit A-10, page 5; Exhibit A-24, page 4, lines 15-30).

6. THE DISTRICT COURT'S VIEW, THAT THE INFORMATION APPELLANT RECEIVED IN 1984, DURING A PRE-RETIREMENT INTERVIEW, THAT APPELLANT'S PENSION WILL REMAIN

UNCHANGED SHOULD APPELLANT CONTINUE TO WORK BEYOND AGE 65, CONSTITUTES A VALID AND APPLICABLE MODIFICATION OF THE 1975 PENSION AND BENEFITS PLAN, IS CLEARLY ERRONEOUS.

The District Court has viewed the pre-retirement interview appellant attended on 4/24/84 and the Memo prepared by appellees and signed by appellant with clear disagreement (Exhibit A-26) as a valid modification of the 1975 Con Edison Pension and Benefits Plan (Exhibit A-24, page 3, lines 18-26; page 4, lines 1-13). The District Court's view that the information appellant received during the pre-retirement interview on April 24, 1984, that appellant will not accrue pension credits should he continue to work beyond age 65 and the Memo containing this

information, signed by appellant with clear disagreement on 4/24/84, would be equivalent with a valid modification of the 1975 Con Edison Pension and Benefit Plan, particularly of the 1975 clear definition of the "Accredited Service for the computation of a Pension" (Exhibit A-11, page 14, lines 6-12) is clearly erroneous.

The promises made by the appellees in the 1975 Con Edison Pension and Benefits Plan, specifically the formula of computation of a pension (Exhibit A-11, page 14, lines 6-12), are binding and enforceable in conformity with Section 1132 (a) (1) (B) of E.R.I.S.A.

The promise made by appellees in the new 1983 Retirement Plan for Management Employees, booklet of 40 pages, that the old formula of computation of a pension

on the basis of the "Total Salary prior to Retirement" will continue to be applied to participants of the prior 1975 Pension and Benefits Plan, is underlying the continuous validity of the old formula for computation of a pension provided in the 1975 Con Edison Pension and Benefits Plan (Exhibit A-11, page 14, lines 6-12; Exhibit A-10, page 5, "Benefits for Participants of the Prior Plan"). The information given by appellees to the appellant on 4/24/84, that appellees intend to freeze the accredited service at age 65 and the Memo prepared by appellees and signed by appellant with clear disagreement on the same day of 4/24/84 (Exhibit A-26) cannot be interpreted as a valid modification of the clear definition of the "Accredited Service for the computation of a Pension"

contained in the 1975 Con Edison Pension and Benefits Plan (Exhibit A-11, page 14, lines 6-12).

The District Court's view, that the pre-retirement interview of 4/24/84 and the Memo signed by appellant on the same day, at the request of the interviewer, with clearly expressed disagreement, would constitute a valid and applicable modification of the 1975 Con Edison Pension and Benefits Plan, is clearly erroneous (Exhibit A-26; Exhibit A-11, page 14, lines 6-12; Exhibit A-24, page 3, lines 18-26; page 4, lines 1-13).

7. THE DISTRICT COURT'S OPINION THAT IT WOULD EXIST A NEXUS BETWEEN THE CLEAR DEFINITION OF "ACCREDITED SERVICE FOR THE COMPUTATION OF A PENSION", PROVIDED IN THE 1975 PENSION AND

BENEFITS PLAN, AND APPELLANT'S AGE, IS CLEARLY ERRONEOUS.

The 1975 Con Edison Pension and Benefits Plan provides a clear, detailed and complete definition of the "Accredited Service for the computation of a Pension" (Exhibit A-11, page 14, lines 6-12). The definition of the "Accredited Service for the computation of a Pension", provided in the 1975 Pension and Benefits Plan, does not make any condition by age. The only condition requested for accrediting the service of an employee towards the computation of a pension is, that the employee should have been "continuously in the employ of the company in other than a temporary status" (Exhibit A-11, page 14, lines 6-9).

The appellant was continuously in the employ of Con Edison from June 30, 1969

until appellant's retirement on July 1, 1986 (Exhibit A-24, page 1, lines 12-16). The nexus created by the District Court between the "Accredited Service for the computation of a Pension", as defined clearly and in detail in the 1975 Con Edison Pension and Benefits Plan (Exhibit A-11, page 14, lines 6-12) and appellant's age, is clearly erroneous and is not supported by the evidence on record. The clear definition of the "Accredited Service for the computation of a Pension", provided in detail in the 1975 Con Edison Pension and Benefits Plan, is complete and does not allow any additional condition to be connected.

The validity of the definition of the "Accredited Service for the computation of a Pension", as provided in the 1975 Con Edison Pension and Benefits Plan, was

also confirmed by the appellees in the new 1983 Retirement Plan for Management Employees, booklet of 40 pages, by providing on page 5, that the old formula of computation of a pension, retained from the prior (1975) plan, will continue to be applied to participants of the prior 1975 Pension and Benefits Plan, on the basis of the "Total Salary prior to retirement" (Exhibit A-10, page 5, "Benefits for Participants of the Prior Plan").

It appears to be undoubtful, that the nexus created by the District Court between the "Accredited Service for the computation of a Pension" as defined clearly and completely in the 1975 Con Edison Pension and Benefits Plan (Exhibit A-11, page 14, lines 6-12) and the age of the appellant, is clearly erroneous

(Exhibit A-24, page 2, lines 5-11; page 3, lines 1-12).

The statement contained in the District Court's Memorandum Opinion # 63038, "that at no time during plaintiff's employment did the plan provide that months or years worked after attaining age 65 would be credited for pension calculation purposes", is clearly erroneous (Exhibit A-24, page 3, lines 7-10; page 4, lines 29-30). The definition of "Accredited Service for computation of a Pension", provided clearly and completely in the 1975 Con Edison Pension and Benefits Plan, does not make any distinction between service performed at any age --before or after age 65 (Exhibit A-11, page 14, lines 6-12).

8. THE DISTRICT COURT'S OPINION THAT IT WOULD EXIST A NEXUS

BETWEEN THE SPECIAL PROVISION OF THE 1983 RETIREMENT PLAN FOR MANAGEMENT EMPLOYEES, ENTITLED "BENEFITS FOR PARTICIPANTS OF THE PRIOR PLAN", AND THE AMENDMENTS TO THE 1975 PENSION PLAN, CONTAINED IN THE 1983 PLAN, IS CLEARLY ERRONEOUS.

The 1983 Con Edison Retirement Plan for Management Employees, booklet of 40 pages, contains a special provision for participants of the Prior 1975 Pension and Benefits Plan, entitled "Benefits for Participants of the Prior Plan" (Exhibit A-10, page 5). In this special provision for participants of the Prior 1975 Pension and Benefits Plan, the old formula of computation of a pension, on the basis of the "Total Salary prior to Retirement", was reproduced from the 1975

Plan, in order to be applied only to participants of the Prior 1975 Pension and Benefits Plan. This special provision, contained on page 5 (booklet of 40 pages) of the 1983 Con Edison Retirement Plan for Management Employees (Exhibit A-10), exempts the participants of the prior 1975 Pension and Benefits Plan from being subjected to the amendments made unilaterally by the appellees to the 1975 Pension and Benefits Plan, which amendments are contained in the new 1983 Con Edison Retirement Plan for Management Employees.

The creation by the District Court of a nexus between the special provision of "Benefits for participants of the Prior Plan" (Exhibit A-10), page 5) and the amendments made unilaterally by the appellees to the prior 1975 Pension and

Benefits Plan, contained in the new 1983 Con Edison Retirement Plan for Management Employees, annihilates the meaning and the wording, as well as the scope of the special provision of "Benefits for Participants of the Prior Plan" shown on page 5, booklet of 40 pages, of the 1983 Con Edison Retirement Plan for Management Employees (Exhibit A-10, Exhibit A-24, page 4, lines 22-29).

The nexus created by the District Court between the special provision of "Benefits for Participants of the Prior Plan" (Exhibit A-10, page 5) and the amendments to the 1975 Pension and Benefits Plan, contained in the 1983 Retirement Plan for Management Employees, is clearly erroneous (Exhibit A-24, page 4, lines 22-29).

The statement made by the District

Court, that "no prior pension plan provided pension credit for service after age 65",is not supported by the evidence on record and is clearly erroneous (Exhibit A-24, page 3, lines 7-10; page 4, lines 29-30; Exhibit A-11, page 14, lines 6-12).

CONCLUSION AND PRAYER FOR RELIEF

In light of the foregoing, it appears that the Appeal is validly reasoned and justified.

The appellant respectfully prays for the following Relief:

- to be reversed the Order and the Judgement of the District Court;
- to be remanded the case to the District Court for new consideration and Judgement, consistent with the Opinion of the Court of Appeals;
- to be awarded the reimbursement of appellant's costs of Appeal, in the total estimated amount of $4,000.00, consisting of docketing fee, typing costs, copying and binding costs, as well as reasonable attorney's fee and consulta-

tion fees, in conformity with Section 1132 (g) (1) of E.R.I.S.A. (U.S.C. 29);

- any other Relief the Court of Appeals may consider just and proper.

Appellant, Pro Se

/s/Martin A. Schottenfeld
Martin A. Schottenfeld
802 West 190th Street, Apt. 3 D
New York, New York 10040
Tel. (212) 928-6785

Appellant's Exhibit No.

A-3

IN THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

Case Title : MARTIN A. SCHOTTENFELD ,)

Judge : J.E.S. Plaintiff)

vs.)

CONSOLIDATED EDISON COMPANY)

OF NEW YORK, Inc.)

Case No. 87 CIV 2650 Defendant)

THOMAS J. GALVIN ,)

Defendant)

The undersigned MARTIN A. SCHOTTENFELD, 802 West 190-th Street, Apt. 3 D, New York, N.Y. 10040,

-Plaintiff-

submits herewith an

Amended

C o m p l a i n t

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, Inc., 4 Irving Place, New York, N.Y. 10003,

-Defendant-

and

THOMAS J. GALVIN, -Defendant-

c/o Con Edison
4 Irving Place,
Room 1605,
New York, N.Y. 10003

LEGAL BACKGROUND

This complaint is based on E.R.I.S.A. (Employees Retirement Income Security Act) of 1974, with subsequent modifications, as well as on Con Edison Retirement Plan in effect prior to December 31, 1982, combined with Con Edison Retirement Plan for Management Employees, effective January 1, 1983, page 5, Section III, "Benefits for Participants of the Prior

Plan".

THE FACTS PRESENTED

The plaintiff was employed with the defendant since June 1969 and has retired on July 1, 1986, at age 67, after 18 years of service.

In conformity with defendant's Retirement Plan in effect prior to 12/31/1982, as well as in conformity with the new Retirement Plan for Management Employees, effective 1/1/1983, Section III, page 5, "Benefits for Participants of the Prior Plan", plaintiff's retirement pension should have been calculated and paid based on the formula :

2.2% X Total Salary

"Total Salary" means the total salary earnings prior to retirement, as clearly defined in Con Edison's Retirement Plan for Management Employees, page 5, under

the heading "Benefits for Participants of the Prior Plan".

The defendants have violated and broken the above commitment provided in the Retirement Plan, by calculating only the portion of the Total Salary earned until age 65 and by disregarding the salary earnings above 65 and prior to retirement.

Furthermore, the Retirement Plan provides that the 14-th year prior to retirement should be considered as "pivot year" and the earnings in earlier years should be credited at the pivot year's earnings rate. The 14-th year prior to plaintiff's retirement was the year 1972/73. The defendants have violated and broken the above commitment too, by considering as pivot year the year 1970, in which the plaintiff had a lower salary.

The plaintiff has followed the administrative complaining procedure provided in defendant's Retirement Plan, but all the administrative complaints submitted by the plaintiff were denied, including by the Plan Administrator. The constant and repeated denials of plaintiff's pension benefits provided in defendant's Retirement Plan, have caused the plaintiff lots of pain and sufferings.

JURY DEMAND

The plaintiff respectfully asks to be conducted the trial before a JURY.

PRAYER FOR RELIEF

The plaintiff respectfully asks that the defendants should be obligated :

a) to calculate and pay plaintiff's retirement pension on the basis of the total salary earnings prior to

retirement and with the 1972/73 salary year as "pivot year", retroactively from July 1, 1986 ;

b) to pay a penalty of $ 100.00 daily, to compensate partly plaintiff's pain and sufferings, for each day the defendants delay the correct computation and payment of plaintiff's retirement pension ;

c) to pay the trial costs and reasonable attorney's fees.

Plaintiff,

/s/Martin A. Schottenfeld

Martin A. Schottenfeld

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Appellant's Exhibit No.

A-1

87-2650 Sprizzo, J.

PLAINTIFFS

SCHOTTENFELD, MARTIN A.

DEFENDANTS

CONSOLIDATED EDISON COMPANY

OF NEW YORK,INC

GALVIN, THOMAS J.

10/19/87: AMENDED COMPLAINT.

CAUSE

denial of retirement pension

ATTORNEYS

PRO-SE

MARTIN A,SCHOTTENFELD

802 WEST 190 ST Apt.3D

P138

NEW YORK CITY 10040

928 - 6785

Charles E. McTiernan Jr.

4 Irving Place, Room 1815S

New York, New York 10003

(212) 460-2432

DATE MAILED

APR 20 1987 NH117 8-24-88

CIVIL DOCKET: M.A. Schottenfeld -v- Consolidated Edison Co. Docket No. 87-2650

Date	Nr.	PROCEEDINGS
4-20-87	1	Fld Complaint issued summons and notice purs 28 USA 636(c). Jury trial demanded.
8/14/87	2	Filed summons, notice and acknow of receipt S/C, upon: Con Edison Co of NY, by Secy CE Co of NY date: July 30, 1987 JST Peter Irwin, mang agent
8-20-87	3	Fld. Defendants ANSWER to the Complaint. CET RF
8-20-87	4	Fld. Defendants Notice to take Deposition upon oral examination of Martin A. Schottenfeld on 10-8-87. RF

8/31/87	5	Filed pltff pro se Notice of Motion, for an order to add co-deft, JST
9 18 87	-	PRE-TRIAL CONFERENCE HELD BY
10/6/87	6	Filed Order, PTC, pltff pro se's motion to add a co-co-deft is granted, all parties appear before the Court at a pre-motion conf, Nov 20, 1987, 4:30 PM,Sprizzod,cmc
10/19/87	7	Filed pltf pro se AMENDED COMPLAINT. JST
10/27/87	8	Filed Amended Summons, S/C; upon: Consolidated Edison Co NY, by: Kathy Williams, mng agent date: Oct. 26, 1987; upon: Thomas J. Galvin, by: Kathy Williams,

		co-worker date: Oct 26, 1987
11/9/87	9	Filed ANSWER to Amended complt. (by Thomas J. Galvin. CEMc JST
11/9/87	10	Filed ANSWER to Amended Complt. (by Con Edison) CEMc JST
11/20/87	--	PTC held by JES.
12/2/87	11	Filed Order, PTC, pre motion conf for Jan 8, 1988, 4:30 PM, Sprizzo J. cm JST
12/22/87	12	Filed NOtice of Pltffs Motion for partial summary judgment. with pltffs affirmati in support. JST
1/4/88	13	Filed pltff memorandum to pltff motion for partial s/j. JST

1/11/88	--	PRE-MOTION CONF. HELD BY JES.
1/26/88	14	Filed order; PMC, ordered that deft. shall cross-move for summary jt. by 2/12/88; ordered that pltf. shall respond by 3/11/88; deft. shall reply to pltf's response 4/8/88; ordered that ORAL ARGUMENT be held 6/10/88, 10:30 A.M. Sprizzo,J. cmc JST
2/17/88	15	Filed defts Notice of Cross Motion for summary judgment, ret: JUne 10, 1988, with defts rule 3 (g), and Aff of Sheldon E. Reichard attached. JST
2/17/88	16	Filed defts memo of law in opposition to pltffs motion

for partial summary judgment and in support of defts cross motion for summary judgment. JST

2/24/88 17 Filed EXHIBITS in support of Defts Motion for summary judgment. JST

3/11/88 18 Filed pltff pro se Memorandum of Law. JST

3/14/88 19 Filed Affidavit of Martin A. Schottenfeld in support of pltffs memorandum of law. JST

8-22-88 20 Fld memo opinion and order #63038 for the reasons set forth pltffs motion for partial summary judgemnt is denied and defts cross-motion for summary judgment is granted. The clerk of

court is directed to enter judgment and close this action. SPRIZZO, J. cmc LA

8-21-88 21 Fld judgement ordered that this action is dismissed. RAYMOND F. BURGHARDT, clerk EOD 8-26-88 LA

8-26-88 --- Mailed out copy of judgment with appeal form to pltffs and defts attnys.....

9-23-88 22 Fld notice of appeal to the USCA 2nd Circuit from M&O #63038. cm LA

9-30-88 --- Forewarded copy of notice of appeal to Dist. Judge and copy of notice of appeal with docket entries to Court of Appeals...LA

10-7-88 23 Fld notice that original record has been transmitted

		to the USCA 2nd Circuit on 10-7-88 LA
1-30-89	24	Fld notice that 1st supplemental record has been transmitted to the USCA 2nd Circuit on 1-30-89. LA
4-4-89	25	Fld true copy of order from the USCA, ordered that said judgment from the said Dist Court is affirmed...ELAINE B. GOLDSMITH, CLERK EOD 4-6-89 cm LA